ORIGINAL
4 12 copies

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
The Petition of the State of Minnesota	)	**CC Docket No. 98-1**
Acting by and Through the Minnesota	)	
Department of Transportation and the	)	
Minnesota Department of	)	
Administration, for a Declaratory Ruling	)	
Regarding the Effect of Sections 253(a),	)	
(b) and (c) of the Telecommunications	)	
Act of 1996 on an Agreement to Install	)	
Fiber Optic Wholesale Transport	)	
Capacity in State Freeway Rights-of-Way	)	

REPLY COMMENTS
OF THE
MINNESOTA TELEPHONE ASSOCIATION

David Cosson
Kraskin, Lesse & Cosson, LLP
2120 L Street, NW, Suite 520
Washington, DC 20037
(202)296-8890

Richard J. Johnson
Moss & Barnett, PA
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129
(612)347-0300

Date: April 9, 1998

INTRODUCTION

The Minnesota Telephone Association ("MTA") hereby replies to comments and oppositions by other parties (collectively the "Comments") to the Petition by the State of Minnesota for a Declaratory Ruling (the "Petition") that the Agreement between the State of Minnesota ("the State"), ICS/UCN, LLC ("the Company") and Stone & Webster Engineering Corporation ("S & W") dated December 23, 1997 ("the Agreement") complies with the requirements of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "1996 Act"). As the Comments of literally *all* telecommunication service providers demonstrate, the 10 to 20 year exclusive use of the freeway rights-of-way provided to the Company under the Agreement (the "Exclusive Freeway Use") constitutes a legal requirement that will have the effect of violating Section 253(a) by preventing *many* entities from providing telecommunications services. Further, the Agreement is not within the exceptions permitted by Section 253(b) or 253(c) because it is neither necessary nor competitively neutral. Accordingly, the Federal Communications Commission ("Commission") should preempt the Agreement under Section 253(d).

DISCUSSION

Comments from the full range of telephone service providers unanimously agree and thoroughly demonstrate that the Exclusive Freeway Use imposes a significant barrier to competition in violation of Section 253(a). This unanimous conclusion was based on: a) careful review of Section 253(a) and prior decisions of the Commission; b) the terms of the Agreement itself; and c) analysis of the economic impacts on other facility based service providers of the Exclusive Freeway Use, both now and extending throughout its 10 to 20 year duration. In

contrast, the only support for the State and the Agreement was provided in abbreviated and very similar letters submitted by other state highway regulatory authorities stating, without explanation, their conclusion that the Agreement reflects an appropriate "balance."

To the contrary, the "balance" reflected in the Agreement is inconsistent with both the 1996 Act and the facts, as the Comments of the service providers conclusively demonstrate. The California Department of Transportation ("Caltrans") recognizes that it lacks sufficient information to support the Agreement, but requests that the Commission adopt four principles in an effort to provide guidance to the states regarding their longitudinal freeway access policies. To the extent that the Commission may seek to establish broad guidance for use of rights-of-way in this proceeding, the principles proposed by Caltrans must be modified significantly to meet the requirements of the 1996 Act.

1. The Very Range of Service Providers Opposing the Agreement Underscores Its Adverse Effect On Competitors.

The unanimous opposition from across the full spectrum of telecommunications service providers itself demonstrates the anticompetitive effect of the Agreement, and refutes the arguments of the State that the Agreement will enhance competition. The unanimous opposition of service providers was based on the severe restriction on their ability to use their own facilities that will result from the Exclusive Freeway Use. Parties opposing the Agreement included individual (and organizations representing) competitive local exchange carriers ("CLECs"), both

large and small;[1] interexchange carriers;[2] cable television providers;[3] a wireless service provider;[4] incumbent local exchange carriers ("LECs");[5] and the Competitive Policy Institute.[6]

Many of the competitive service providers opposing the Agreement are among the entities that would benefit from any "enhancement" of competition.[7] If the Agreement would enhance competition and the supply of fiber facilities, surely some competitive service providers would have recognized that benefit and supported the Agreement. To the contrary, *every* service provider filing comments opposed the Agreement and demonstrated that the Agreement would seriously interfere with a provider's ability to use its own facilities. Opposition was particularly strong among CLECs which sought to become facilities based competitors.[8] Other concerns included interference with the use of new technologies, particularly by new entrants,[9] and

---

[1] See, Comments of: MFS Network Technologies, Inc. ("MFS Comments"); KMC Telecom, Inc. and KMC Telecom II, Inc. ("KMC Comments"); RCN Telecom Services, Inc. ("RCN Comments"); Teleport Communications Group, Inc. ("Teleport Comments"); Association for Local Telecommunications Services ("ALTS Comments"); MCI Telecommunications Corporation ("MCI Comments"); Nextlink Communications, Inc. ("Nextlink Comments").

[2] See, MCI Comments, RCN Comments.

[3] See, Opposition of National Cable Television Association ("NCTA Opposition") and Comments of Minnesota Cable Communications Association ("MCCA Comments").

[4] See, Comments of Midwest Wireless Communications, LLC ("Midwest Wireless Comments").

[5] See, Comments and/or Oppositions of: US WEST, Inc. ("US WEST Comments"); Ameritech Corporation ("Ameritech Opposition"); GTE Service Corporation ("GTE Comments"); National Telephone Cooperative Association ("NTCA Opposition"); SBC Communications, Inc. (SBC Comments"); United States Telephone Association, Organization for Promotion and Advancement of Small Telephone Companies, Western Rural Telephone Association and Competitive Policy Institute ("Opposition of USTA et al"); New York State Telecommunications Association ("NYSTA Opposition").

[6] See, Opposition of USTA et al.

[7] See, Petition of the State of Minnesota for Declaratory Ruling ("Minnesota Petition"), p. 4 ("The practical impact of the Agreement is that the competitive environment will be enhanced") and p. 26 ("[T]he restriction on physical access to the rights-of-way does not cause any similar restriction or prohibition on a utility's ability to offer telecommunications services. Rather, it enhances that ability.")

[8] See, Comments cited at footnote 1 above.

[9] See, KMC Comments, pp. 2-4.

interference with the ability to provide self-maintenance.[10] The existence of alternative routes did not solve these concerns. As RCN noted: "If the alternatives were so attractive, it is doubtful that any entity would value exclusivity."[11]

The range of opponents to the Agreement also thoroughly refutes the State's contention that the opposition of the MTA reflected no more than a desire to preserve an incumbent monopoly.[12] To the contrary, new competitors, both large and small, who have a powerful incentive to eliminate any advantage of incumbents are no less opposed to the Agreement than the MTA itself.

2. State Transportation Authorities Supporting the Agreement Rely On A Balancing Theory That Is Inconsistent With The 1996 Act and Inconsistent With The Facts.

The only support for the State's position comes from other State departments of transportation (and a consultant to those State departments) which filed abbreviated and conclusory letters of support for the "balance" selected by Minnesota Department of Transportation ("MnDOT") and the Minnesota Department of Administration ("MnDOA"). Several defects refute that position.

First, there is no indication in any of those letters that any safety concerns could not be appropriately resolved in other ways, as the far less restrictive written policies of the American Association of State Highway and Transportation Officials ("AASHTO"), the Federal Highway

---

[10] See, ALTS Comments, p.12 fn.13.

[11] See, RCN Comments, p. 7.

[12] See, Minnesota Petition, p. 3 ("The MTA's member companies, of course, already have fiber in place and are most threatened by the introduction of an additional statewide fiber backbone network that will increase competition.")

Administration, the State of Minnesota itself, and several other states clearly show.[13] Other less intrusive methods of securing public safety were also noted, including establishment of periodic construction windows and enforcement of existing policies,[14] and coordination of schedules.[15]

Second, the "balance" achieved by MnDOT is inconsistent with both the Act and prior decisions of the Commission interpreting the Act. The Exclusive Freeway Use maximizes convenience and compensation for the State at the cost of minimizing use of the freeway rights of way. However, both the Act and previous decisions by the Commission provide that competitive barriers will be accepted only to the extent that they are "necessary."[16] "Necessary" does not mean merely convenient or "reasonably related" to the achievement of another policy (safety). Rather, the Commission has held that the use of the term "necessary" in Section 253(b) means that a competitive barrier is valid only if other less restrictive alternatives are not available,[17] even when matters of public safety are involved.[18] The Exclusive Freeway Use is clearly not the least restrictive means of protecting public safety. As MFS noted: "[P]ermitting one party exclusive access...is not the least restrictive means of protecting the public safety, but rather it is the most restrictive means."[19] Clearly, there are many less restrictive ways to protect

---

[13] See, MFS Comments, pp. 16-20.

[14] See, Ameritech Opposition, pp. 4-5.

[15] See, MCI Comments, p. 8.

[16] See, Section 251(b); In the Matter of Public Utility Commission of Texas, CCB Pol 96-13, MEMORANDUM OPINION AND ORDER, 97-346, October 1, 1997 ("PUC of Texas") and In the Matter of Petition of New England Public Communications Council, CCB Pol 96-11, MEMORANDUM OPINION AND ORDER, 11 FCC Rcd 19713 (1996) ("New England").

[17] See, PUC of Texas, ¶ 87.

[18] See, New England, 11 FCC Rcd at 19722-23 (¶ 22).

[19] MFS Comments at p. 3.

public safety.[20] Accordingly, the 10 to 20 years of exclusive use of the freeway rights of way provided by the Agreement cannot meet the requirement of necessity in Section 253(b).

Third, the Agreement provides explicit protection and exclusivity for the Company while providing only vague and unenforceable remedies for other service providers. Several parties noted that the protections for other third party service providers in the Agreement were unlikely to be effective because enforcement mechanisms were lacking.[21] The concerns of these parties are underscored by Section 20.5 of the Agreement, which explicitly negates the rights of third parties (i.e. other telecommunications service providers) to enforce or receive any benefit from the terms of the Agreement.[22] As a result, the provisions for collocation and nondiscriminatory rates are rendered totally ineffective by the combined effect of: 1) the elimination of any rights for other service providers to enforce the Agreement; 2) the lack of any jurisdiction or mechanism for enforcement by MnDOT or the Department of Administration; and 3) the lack of clear enforcement mechanisms by any other agencies, including the Minnesota Public Utilities Commission and the Commission.

Further, to the extent that MnDOT and MnDOA were attempting to facilitate the development of competition for some telecommunications services,[23] a "third tier" of regulation

---

[20] See, NTCA Opposition, p. 5; RCN Comments, p.12; MFS Comments, pp. 16-20; Ameritech Opposition, pp. 4-5; MCI Comments, p. 8.

[21] See, MFS Comments, p. 32; Opposition of USTA, et al, p. 16; Nextlink Comments, pp. 8-9; MCI Comments, p. 5; US WEST Comments, p. 14.

[22] Section 20.5 of the Agreement reads:

> **No Additional-Party Beneficiaries.** Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of Lenders.

[23] MnDOT and MnDOA attempted to promote another source of capacity for "retail" use by granting a competitive advantage to a single "wholesale" provider "balanced" with certain obligations to make that capacity available to retail service providers.

(by MnDOT and/or MnDOA) is the result. The Commission has recognized that the addition of a third tier of regulation is inherently suspect.[24]

In its comments, Caltrans indicates that is it is presently reviewing its longitudinal freeway and access policy and proposes four principles which it requests that the Commission "confirm ... are consistent with federal communications law and regulations."[25] If the Commission chooses to establish principles in this proceeding for application in other situations, each of Caltrans' proposed principles[26] must be, as indicated below, substantially modified to meet the requirements of the 1996 Act.

Caltrans' Proposed Principle No. 1:

1. That the Telecommunications Act of 1996 does not effect the traditional rights of state transportation departments to control or prohibit utility easements and/or encroachments.

MTA Response:

The 1996 Act *does* affect the right of states (or local governments) to control or prohibit utility easements in that any such control or prohibition applied to telecommunications providers must be competitively neutral and nondiscriminatory, and any compensation publicly disclosed. Where the effect of such state actions is to prohibit any entity from providing any interstate or intrastate telecommunications service, the Commission must be particularly careful that the requirements of Section 253 (c) are met.

---

[24] See, In the Matter of TCI Cablevision of Oakland County, Inc. CSR-4790, MEMORANDUM OPINION AND ORDER, 12 FCC Rcd 21396 (1997); MFS Comments, p. 8.

[25] Caltrans Comments at 1.

[26] See id. at 1-2.

Caltrans' Proposed Principle No. 2:

2. That if a state transportation department chooses to allow such encroachments, it can be done on any nondiscriminatory basis chosen by the state. This can include limiting the number and size of fiber optic conduit(s).

MTA Response:

Where use by telecommunications providers is involved, nondiscrimination is not the only requirement that the state must meet. Limitations on the number of users must also be *"necessary"* to achieve public safety, which cannot be justified by increasing the monetary benefit to the state.

Caltrans' Proposed Principle No. 3:

3. That a state transportation department can choose a "Master Tenant" to manage such a system.

MTA Response:

A "Master Tenant" *may not be granted* exclusive use of rights-of-way. Subsequent users must have the opportunity to choose either to become "subtenants" or to install their own facilities separate from the facilities of the Master Tenant. Even where use of the right-of-way is non-exclusive, the Master Tenant approach is inherently subject to discrimination and abuse, particularly if the Master Tenant *or its affiliate* is in competition with other providers.[27] Because of these inherent risks, the Commission should subject any Master Tenant arrangement to particular scrutiny.

[27] Any Master Tenant will necessarily obtain valuable information about its competitors business, as well as have numerous opportunities to slow their progress, increase their cost and interfere with their service.

Caltrans' Proposed Principle No. 4:

4. That state transportation departments can obtain consideration (monetary, fibers, and/or in-kind services) from a provider using state right of way.

MTA Response:

While a state is entitled to compensation for use of the right-of-way, such compensation must be publicly disclosed and receipt can not be delegated to a private party.[28] Agreements of the type adopted by Minnesota provide a myriad of opportunities to disguise the compensation, and make it extremely difficult to enforce the requirement of Section 253(c) that compensation be "fair and reasonable."[29]

CONCLUSION

For the reasons set forth in the initial Opposition and request for Preemption of the Minnesota Telephone Association and in the Comments of the other parties, the MTA respectfully urges the Commission to deny the request for declaratory ruling and to preempt the Agreement under Section 253(d).

Respectfully submitted,

MINNESOTA TELEPHONE ASSOCIATION

David Cosson
KRASKIN, LESSE & COSSON, L.L.P.

Richard J. Johnson
MOSS & BARNETT, P.A.

[28] There is no indication in the Act that a state can delegate its authority to receive reasonable compensation to a third party. See, MFS Comments, p. 3.

[29] See, Section 253 (c); US WEST Comments, p. 23.

CERTIFICATE OF SERVICE

I, Colleen von Hollen, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that on this 9th day of April, 1998, a copy of the foregoing Reply Comments of Minnesota Telephone Association were sent by first class, postage prepaid, U.S. mail, to the following:

Colleen von Hollen

Janice M. Myles *
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 544
Washington, DC 20554

A. Richard Metzger, Acting Chief *
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

ITS, Inc. *
1919 M Street, NW, Room 246
Washington, DC 20554

Scott Wilensky, Esq.
Assistant Attorney General
Office of Attorney General
445 Minnesota Street
St. Paul, MN 55101-2130

Andrew D. Lipman
C. Joel Van Over
Antony R. Petrilla
Swidler & Berlin, Chartered
3000 K Street, NW, Suite 300
Washington, DC 20007
Counsel for MFS Network Technologies

Kecia Boney
Lisa Smith
MCI Telecommunications Corp.
1801 Pennsylvania Avenue
Washington, DC 20006

* Via Hand Delivery

Tricia Breckenridge, Vice Pres.
KMC Telecom Inc.
KMC Telecom II, Inc.
3075 Breckinridge Blvd., Suite 415
Duluth, GA 30096

L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Avenue, NW
Washington, DC 20037

John F. Raposa, HQE03J27
GTE Service Corp.
P.O. Box 152092
Irving, TX 75015-2092

Gail L. Polivy
GTE Service Corp.
1850 M Street, NW, Suite 1200
Washington, DC 20036

Teresa Marrero
Teleport Communications Group, Inc.
Two Teleport Drive
Staten Island, NY 10311

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
National Cable Television Association
1724 Massachusetts Avenue, NW
Washington, DC 20036

James T. Hannon
US WEST, Inc.
1020 19th Street, NW, Suite 700
Washington, DC 20036

Howard J. Symons
Michelle M. Mundt
Mintz Levin Cohn Ferris Glovsky & Popeo
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
Counsel for NEXTLINK

R. Gerard Salemme
Daniel Gonzalez
NEXTLINK Communications, Inc.
1730 Rhode Island, NW
Suite 1000
Washington, DC 20036

Mary McDermott
Linda Kent
Keith Townsend
Lawrence E. Sarjeant
United States Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005-2164

Sam J. Maselli
Western Rural Telephone Association
555 University Avenue, Suite 137
Sacramento, CA 95825

Lisa M. Zaina
Stuart Polikoff
OPASTCO
21 Dupont Circle, NW, Suite 700
Washington, DC 20036

Ronald Binz
Debra Berlyn
John Windhausen, Jr.
Competition Policy Institute
1156 15th Street, NW, Suite 310
Washington, DC 20005

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
888 17th Street, NW
Washington, DC 20006

Gerald A. Friedrichs
Ameritech Corp.
2000 West Ameritech Center
Hoffman Estates, IL 60196

Russell D. Lukas
David L. Nace
Lukas, Nace, Gutierrez & Sachs
1111 19th Street, NW, 12th Floor
Washington, DC 20036
Counsel for Midwest Wireless
Communications, LLC

Joseph O. Kahl
RCN Telecom Service, Inc.
105 Carnegie Center
Princeton, NJ 08540

Russell M. Blau
Jonathan D. Draluck
Swidler & Berlin, Chartered
3000 K Street, NW, Suite 300
Washington, DC 20007-5116
Counsel for RCN Telecom Services, Inc.

Robert W. Zinnecker
New York State Telephone Association
100 State Street, Suite 600
Albany, NY 12207

Lee F. Deter, Deputy Director
Department of Transportation
State of California
1120 N Street
Sacramento, CA 94273-0001

Steve McDonald, Division Engineer
Missouri Department of Transportation
105 West Capitol Avenue
Jefferson City, MO 65102

Hugh W. Parry, Deputy General Counsel
New Mexico State Highway &
Transportation Department
P.O. Box 1149
Santa Fe, NM 87504-1149

H. Darrell Barger
Butler County Transportation
Improvement District
2816 Mack Road
Fairfield, OH 45014

Curtis A. Wiley, Commissioner
Indiana Department of Transportation
100 North Senate Avenue
Room N755
Indianapolis, IN 46204-2249

D.W. Vaughn, Asst. Trans. Director
Alabama Department of Transportation
1409 Coliseum Blvd.
Montgomery, AL 36130-3050

David T. Newbern, Director
Texas Department of Transportation
125 E. 11th Street
Austin, TX 78701-2483

Thomas F. Broderick, Chief Engineer
Massachusetts Highway Department
Ten Park Plaza
Boston, MA 02116-3973

Mark Stirling
Crown Castle International Corp.
510 Bering Drive, Suite 500
Houston, TX 77057

Joseph L. Perkins, Commissioner
Department of Transportation
State of Alaska
3132 Channel Drive
Juneau, AK 99801-7898

Anne P. Canby, Secretary
Department of Transportation
State of Delaware
P.O. Box 778
Dover, DE 19903

Dwight M. Bower
Transportation Department
State of Idaho
P.O. Box 7129
Boise, ID 83707-1129

Darrel Rensink, Director
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Allan L. Abbott, Director
State of Nebraska
Department of Roads
1500 Nebraska Highway 2
Lincoln, NE 68509-4759

William D. Anker, Director
Department of Transportation
State of Rhode Island
Capital Hill
Providence, RI 02903-1124

Thomas F. Barry, Jr., Secretary
Florida Department of Transportation
605 Suwannee Street
Tallahassee, FL 32399-0450

J. Bruce Saltsman, Sr.
State of Tennessee
Department of Transportation
Suite 700, James K. Polk Bldg.
Nashville, TN 37243-0349

Clinton D. Topham, Deputy Director
State of Utah
Department of Transportation
4501 South 2700 West
Salt Lake City, UT 84119-5998

Dean Carlson, Secretary
Kansas Department of Transportation
Docking State Office Bldg.
Topeka, KS 66612-1568

Kenneth I. Warren, Exec. Director
Mississippi Department of Transportation
P.O. Box 1850
Jackson, MS 39215-1850

Michael J. Keogh, Director
New York State Thruway Authority
200 Southern Blvd.
Albany, NY 12201-0189

John B. Wiliamson, Jr.
State of North Carolina
Department of Transportation
P.O. Box 25201
Raleigh, NC 27611-5201

Marshall W. Moore, Director
North Dakota Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700

Pix Howell
DPD - Comprehensive Resource Planning
1508 South Lamar Blvd.
Austin, TX 78704

David R. Gehr, Commissioner
Commonwealth of Virginia
Department of Transportation
1401 East Broad Street
Richmond, VA 23219

The Honorable Arne H. Carlson
Governor, State of Minnesota
Office of the Governor
St. Paul, MN 55155

James D. Ellis
Robert M. Lynch
Durward D. Dupre
Jonathan W. Royston
SBC Communications, Inc.
One Bell Plaza, Room 2402
Dallas, TX 75202